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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Chief Administrative Law Judge

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Appellate Case No. 2012-213180

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Duke Energy Corporation, .....Appellant,

v.

South Carolina Department of Revenue,.....Respondent.

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**Return to Petition for Rehearing**

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Duke Energy is not entitled to rehearing of Opinion No. 5274 (Shearouse Adv. Sh. No. 40) because it does not identify anything that this Court did not consider in rendering its decision.

**I. Duke Energy's self-characterization of its business as "not manufacturing" does not merit rehearing on the Manufacturing Issue.**

Rehearing should be denied for the Manufacturing Issue because, as this Court correctly recognized, the South Carolina Supreme Court already has held that electric utilities in general, and Duke Energy in particular, are manufacturers for purposes of the tax code. *See* Op. at 53-54 (citing *Columbia Railway, Gas & Electric Co. v. Query*, 134 S.C. 319, 132 S.E. 611 (1926) & *Duke Power Co. v. Bell*, 156 S.C. 299, 152 S.E. 865 (1930)). Instead of discussing or analyzing these precedential holdings, Duke Energy repeats the argument

that single-factor apportionment is required because it identifies its electric business as a service. But Duke Energy never met its burden to establish any basis for determining that its principal business in South Carolina is other than manufacturing electricity and the ALC's finding in that regard is supported by substantial evidence. Op. at 56. Duke Energy's superficial argument that the Department conceded otherwise is unhelpful and fails to address the substance of the Department's arguments, the ALC's determination, or this Court's Opinion. And Duke Energy's resort to ambiguity as a basis for rehearing is misplaced because, as reflected in this Court's opinion, there is nothing ambiguous about the plain and ordinary meaning of the word "manufacturing" in the context of this case and the *Columbia Railway* and *Duke Power* decisions.

**II. Rehearing of the Gross Receipts Issue is not merited because the return of invested principal is not part of the apportionment formula.**

Duke Energy's request for this Court to change its mind does not merit rehearing of the Gross Receipts Issue. *See Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) ("The purpose of a petition for rehearing is not to...have the case tried in appellate court a second time."). In essence, Duke Energy's argument is that the Court erred by viewing the short-term investment transactions for what they were: a very typical investment transaction involving a recovery of invested principal. The Court correctly held that, based on the true nature of these transactions, including the recovered principal in the apportionment formula would be contrary to the plain meaning

and purpose of the apportionment statutes. Op. at 58-59. Duke Energy seeks to evade this result by resorting to claims of ambiguity, but the plain meaning of the apportionment statutes is not rendered ambiguous merely because Duke Energy disagrees with the Court's ruling. *See Bank of Am. Nat. Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 461, 119 S. Ct. 1411, 1425 (1999) (Thomas, J., concurring) ("A mere disagreement among litigants over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply wrong.").

### Conclusion

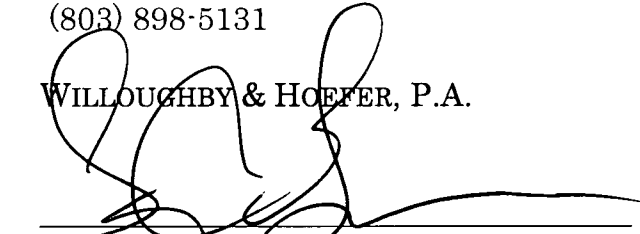
The petition for rehearing should be denied for all issues.

Respectfully submitted,

S.C DEPARTMENT OF REVENUE

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November 3, 2014

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**HAND DELIVERY**

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, South Carolina 29201

Re: *Duke Energy Corp. v. S.C. Dep't of Revenue*, No. 2012-213180

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of the Respondent South Carolina Department of Revenue's Return to Petition for Rehearing along with Proof of Service. Please file-stamp the extra copy and return it by the courier delivering these materials.

Thank you. If you have any questions, please call.

Very truly yours,

**WILLOUGHBY & HOEFER, P.A.**

  
Tracey C. Green

TCG/db  
Enclosure

cc: Burnet R. Maybank, III, Esquire  
Tanya A. Gee, Esquire  
Jeffery A. Friedman, Esquire  
Eric S. Tresh, Esquire  
Maria Todorova, Esquire

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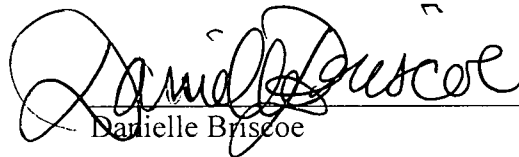
Duke Energy Corporation,.....Appellant,  
v.  
South Carolina Department of Revenue,.....Respondent.

This is to certify that I, an administrative assistant with the law firm Willoughby & Hoefler, P.A., have caused to be served this day one (1) copy of the **Respondent's Return to Petition of Rehearing** by placing the same in the care and custody of the U.S. Postal Service addressed as follows:

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\_\_\_\_\_  
Danielle Briscoe

Columbia, South Carolina  
This 3rd day of November 2014.